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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-930

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL.,
Petitioners

v.

EAZOR EXPRESS, INC., ET AL.,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM*

I. Liability

A. Respondent contends that the Court of Appeals' holding "that necessarily implied in the unions' agreement that there should be no strike was an obligation on their part to use every reasonable means to bring to an end a strike begun by their members without their authorization" (Pet. App. 50a) is confined to "the particular contract involved in this case" (Opp. 36). This tactic is without merit. It is quite clear from the Court's entire discussion (Pet. App. 50a-57a) [1] that the Court was treating with no-strike clauses as

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* Throughout this Reply we will refer to the Petition for Certiorari as "Pet." and the Brief in Opposition as "Opp."

[1] Respondent cites only pages "52a-56a" (Opp. 36), thereby eliminating from consideration the beginning and the end of the Court's analysis.

a class, construed in the light of traditional contract principles and "the policy of our national labor laws," *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448, 456.[2] Even when, in the passage relied on by respondent (Opp. 38-39), the Court addresses itself to the language of the National Master Freight Agreement (NMFA) and its supplements, the Court's reading follows from its view of the nature of no-strike clauses generally—namely, that they would be "illusory indeed" (Pet. App. 50a) unless that duty were implied:

> "Since the obligation is one which is implied from the no-strike clause as necessary for the fulfillment of the obligation of that clause, it is merely recognized as existing, but not created, by the recital of it in the preliminary clause of the paragraph from the Central States Area Local Cartage Supplemental Agreement which we have quoted." (*Id.* 56a).[3]

The holding that the duty arises from the no-strike clause, to effectuate the promise contained therein, is equally applicable to all such clauses; thus, the same

[2] The sweep of the Court of Appeals' holding is further confirmed by its treatment of *United Construction Workers* v. *Haislip Baking Co.,* 223 F.2d 872 (4 Cir.) cert. denied, 350 U.S. 847. Had its decision rested significantly on any unique language of the agreements herein, the Court would have distinguished the *Haislip* case on that basis; instead, the Court stated the controlling difference to be between those agreements which contain an *express* no-strike clause and those in which a no-strike promise is *implied.*

[3] It was our position in the courts below, and we continue to maintain that Local 377, as a signatory to the Central States Area Supplemental, had expressly agreed to use every reasonable means to terminate the strike, so that as to Local 377, the only liability issue is whether it breached that promise—a question which turns in the first instance on the standard to be applied, see Question 1(c), p. 2 of the Petition. That was also the view of the trial court (Pet. App. 8a-9a), but the Court of Appeals derived the contractual duty exclusively by implication from the no-strike clause in the NMFA (App. 50a-57a).

result would follow in all other cases whether or not the existence of that duty is elsewhere "recognized" in the agreement.[4]

B. On the merits of the liability issues, our reply can be brief.

In relying on Senator Taft's observation that " * * * wildcat strikers ought to be disciplined if they prevent a responsible labor leader from performing his agreement" (Opp. 43), respondents neither cite the Congressional Record nor describe the context of his remarks. The omitted citation is 92 Cong. Rec. 5706 (*1946*). The remark was made in the course of debate on a subsection of the Case bill in the 79th Congress, specifically, a subsection thereof which would have deprived of his "employee" status under the Act any employee who engages in a strike which is in breach of contract and not ratified or approved by the union; this penalty was not provided for in § 301 of the bill which Senator Taft brought to the floor in the 80th Congress or of the Taft-Hartley Act. The precise context was that Sen. Capehart had described a provision in many Mine Workers' contracts at that time whereby the union automatically fined wildcat strikers; in the quoted remarks Sen. Taft was expressing his approval. This is, of course, far short of an endorsement of union liability for unauthorized wildcat strikes where the union has not undertaken to police the agree-

[4] In restating the other liability questions respondents inject factual detail which played no role in the decision below. Under the Court of Appeals' "mass action" theory the union's liability rested entirely on the fact that all the members employed by plaintiffs were involved in the strike and not on any of the other factors detailed in respondents' Question 1(b); nor is there any basis in the Court's opinion for believing that the "evidence" detailed in respondents' Question 1(c) was the reason for the Court's conclusion that the strike would have terminated promptly if only the defendants had replaced the stewards and disciplined the strikers.

ment; in the debates on § 301(b) and (c) in the 80th Congress Sen. Taft expressly and categorically *negated* such liability, see Pet. 27, text and note at n. 22.

Respondents do not accept Chief Justice Taft's holding in *Coronado Coal Co.* v. *United Mine Workers,* 268 U.S. 295 (1925) (Opp. 45-46); they contend that if our argument based on that case "were valid, no liability could ever be imposed on any union for an illegal strike unless a majority, or perhaps all, of its members participated" (*id.* 46). Of course, that would *not* be the result, since under *Coronado* the union is liable for the acts which its officers or agents authorize, participate in or ratify. That, of course, is precisely what Congress intended in enacting § 301(e): When Congress subjected unions to suit as entities and declared that they would be liable for the acts of their agents, but not of their members, Congress established legislatively the same rule which this Court had established as the common law in the *Coronado* cases.

When the lower courts impose liability under § 301 without even addressing themselves to the authoritative statements defining liability made by the sponsor of the legislation, they forget that the "judicial function is confined to applying what Congress has enacted after ascertaining what it is that Congress has enacted." *Carpenters' Union* v. *Labor Board,* 357 U.S. 93, 100. Thus, review is required not only because of the intrinsic importance of the liability issues to labor-management relations, but because it is the ultimate responsibility of this Court to assure that the federal judiciary does not transgress its proper functions.

II. Damages and Interest

A. The Petition for Certiorari presents a pure question of law with respect to the amount of plaintiffs' loss during the strike period which was the "starting point" of the damage calculations in both courts. That

question is whether the failure of the District Court to find specially the facts underlying its determination that the strike loss of $1,079,332 was error. In this Court, respondents agree, indeed insist, that the trial court erred in failing to make adequate findings on the issue of strike loss (Opp. 47), and acted in a "highly arbitrary manner in [dealing] with every other damage claim [excluding interest] of the plaintiffs in order to reach his final verdict" (*id.* 54). Given the express requirements of Rule 52(a) and the decisions of other Circuits (cited at Pet. 45)[5] which have insisted on compliance with Rule 52(a) in the calculation of damages, the propriety of review on this issue should therefore be beyond dispute.

Nevertheless, respondents seek to avoid review of this issue, asserting that the trial court must have arrived at its result by following the argument presented by the plaintiffs to the trial court, and that the Court of Appeals was invited to examine those requested findings and affirmed the trial court on the basis of such review (Opp. 48-50).

There are two independently conclusive answers to respondents' contention: The first is a point of principle: A major purpose of the requirement of specificity in Rule 52(a) is to cause the trial judge to fully and conscientiously consider the basis for his decision. See, *e.g., United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 656, n. 4; *Finney* v. *Arkansas Board of Correction*, 505 F.2d 194, 212, n. 15 (8 Cir.). The more complex the issues, the more important is the discipline of putting on paper the analysis by which a result is reached. Additionally, specificity in the findings focuses the adversary process on appeal thereby facilitating judicial review in a manner for

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[5] To this list can now be added *Lenfest* v. *Caldwell,* 525 F.2d 717, 725-726, 728 (2 Cir.).

which an independent search of the briefs in the trial court cannot substitute, even if the appellate court is ready and able to undertake the task. Second, on this record, respondents' contention is wholly spurious: The materials described at Opp. 48-49 could not have been the basis of the trial court's choice of $1,079,332 *rather than some lower figure,* as defendants urged in both counts below, a position with which plaintiffs' own accountant agreed in substantial part. The elaborate schedule reproduced at Opp. 48 merely creates an illusion of exactitude. For while that schedule shows certain adjustments *made by plaintiffs' counsel* to reduce an even higher figure, and while the "justification for each of such adjustments was explained in Eazor's primary Brief as to damages in the trial court (Supplement Appendix 206b-207b) with precise annotations to the Record" (Opp. 48-49), that schedule does not show (and the "justification" does not discuss) why certain other adjustments were *not* made. Most importantly, the reasoning which respondents attribute to the trial court cannot explain why the loss for the strike period was not reduced to "around $700,000" (Opp. 29) (actually $696,255) as Bache, Eazor's accountant testified was required, and as the exhibits which he prepared[6] established; thus, it remains unknown why the trier of fact rejected the opinion of accounting witnesses for both sides and adopted as a "starting point" a figure more than $375,000 greater than that which the accountants agreed was permissible as proper accounting practice. Nor of course do the materials show why ten other adjustments urged by defendants' accountants (and further reducing the total to $208,375) were not made.

[6] Exhibit P-183, 3JA (Exhibits) 655a; Def. Int. Exhibit Y-2, 4JA (Exhibits) 1176a, entitled "RESTATEMENT OF LOSSES FOR AUGUST AND SEPTEMBER, 1968 AS PROPOSED BY PLAINTIFFS".

For the same reasons, the Court of Appeals could not have divined the trier of fact's reasoning on the damage issues which the defendants raised on appeal, even if it had reviewed the materials which respondents now say were the basis for his conclusion. And this brings us to an additional reason why respondents' contention here is spurious: There is no indication in the Court of Appeals' opinion that it did review those materials; indeed, those materials were not called to the Court of Appeals' attention by either party, for the obvious reason, that they did not deal with any of the issues which were in dispute on the appeal. (Indeed, though a hasty reading of Opp. 48-50 might give a contrary impression, respondents do not assert that they called those proposed findings and briefs to the Court of Appeals' attention.) The issues which were in dispute on defendants' appeal were the additional adjustments which the defendants urged be made; The Court of Appeals did not take either course which defendants urged: It neither remanded the case for further findings, nor recalculated the strike loss on the basis of some or all those adjustments. Instead, it accepted the District Court's unexplained $1,079,332 figure. The Court of Appeals thereby sanctioned a clear violation of Rule 52(a), a proposition which even respondents do not dispute.

B. In restating Question 2(a) of the Petition respondents say:

> "The damages awarded consisted of the operating losses which two carriers sustained during a four-week period, and both sides produced experts who testified to the amount of such losses on the basis of the same accounting records. The differences in the conclusions reached were solely the result of differences of opinion as to matters of proper accounting practice in specifically defined areas." (Opp. 3)

Respondents thus convey the impression, if they do not actually state in so many words, that the only dispute *between the parties* in the trial court and on appeal was over the issues as to which the expert witnesses were in disagreement. That impression is incorrect. As we have already stated, and as we shall now document, a substantial part of the disagreement between the parties was with respect to adjustments which the expert accountants agreed should be made; that is, while there were "differences in the conclusions" with respect to whether the amount of the strike loss should be $696,255 or some lesser figure to a minimum of $208,375, the experts were in agreement that $696,255 was the maximum which "proper accounting practice" could justify.

This much is grudgingly acknowledged in the Brief in Opposition:

> "When trial resumed, *the defendants called Mr. Bache* [plaintiffs' own house accountant and accounting witness] *as their witness,* and he testified, on the basis of painstaking efforts made since he testified in May, to each specific adjustment which could be made in the figures for August and September, 1968, *by following the methods adopted by Teamster accountants* (J.A. 4463-4498); these adjustments would have reduced the losses in those two months to around $700,000." (Opp. 28-29, emphasis added.)

But respondents attempt to draw the force from that admission by the false or misleading phrases which we have underscored. It is not true that "defendants called Mr. Bache as their witness" (Opp. 28), and that plaintiffs' counsel developed information "on cross-examination of Bache" (*id.* 29). The record is quite clear that Eazor's accountant at no time became defendants' witness:

> "MR. DICKSTEIN: Your Honor, I will call him now as for cross.
> THE COURT: All right." (13JA 4468).[7]

And respondents' description is misleading to say the least also when it characterizes the revised figures for August and September, 1968 as "following the methods adopted by Teamster counsel" (Opp. 28): the innuendo here (and in the phrase "the same alternative method" (Opp. 29)) is that there remained a dispute between the accounting experts about whether "around $700,000" was the maximum loss which could be attributed to the strike period. Actually, however, that figure was arrived at by Bache himself and was, as noted at p. 6, n. 6 *supra,* set forth in two exhibits prepared by Eazor's accountants, one of which was entitled "RESTATEMENT OF LOSSES FOR AUGUST AND SEPTEMBER, 1968 AS PROPOSED BY PLAINTIFFS". Indeed, plaintiffs' counsel himself had acknowledged in a letter describing Bache's analysis:

> "However, the analysis which Mr. Bache made between May and June, and of which you were provided copies on June 10th, establishes quite clearly that the operating statements for the months of August and September were so skewed by the results of the work stoppage that the losses reflected, while generally accurate on a direct recording basis, *substantially overstated the losses for those months after allocation of expenses* and *revenues to the periods when the expenses were actually incurred and revenue actually earned.*" (P-180, 3JA (Exhibits) 852a-853a).

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[7] This occurred because, although "plaintiffs closed their case with the express understanding that Bache would be called in rebuttal if, as anticipated, the Teamsters accountants testified to proposed adjustments of Bache's figures," (Opp. 27), after those adjustments had been made plaintiffs' counsel refused to state that he would recall Bache and introduce the exhibits he had prepared. (3JA 4467-4468).

Thus, when plaintiffs submitted the figure of $1,079,332 to the trial court they repudiated their own concession, as well as the testimony of their expert witness. Yet, it is that figure which the trial court accepted, and which the absence of specific findings successfully insulated from appellate review.[8]

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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[8] With respect to the prejudgment interest issues, only two points need be made:

As to Question 2(b): For aught that appears on the record the reason that the trial court awarded interest was that it agreed with the position espoused by plaintiffs (Opp. 52) that this award was required by law; in that event, it would not have exercised its discretion as the Court of Appeals surmised, but would have committed an error of law, as the Court of Appeals understood.

As to Question 2(c): There is no basis in the opinion for respondents' assertion that the Court of Appeals "independently determined" (Opp. 4) that prejudgment interest is appropriate with respect to increased judgment. The need for articulated reasons (particularly where the amount involved is as large as here) is further evidenced by the reason which respondents attribute to the Court of Appeals (Opp. 54). Not only is it highly unlikely that the Court decided the question itself because it feared that the trial court would act arbitrarily on remand, that ground for decision, if articulated, would have undermined the Court of Appeals' affirmance of his interest award on the original judgment, and cast further doubt on the propriety of its acceptance of his unexplained strike loss finding.